



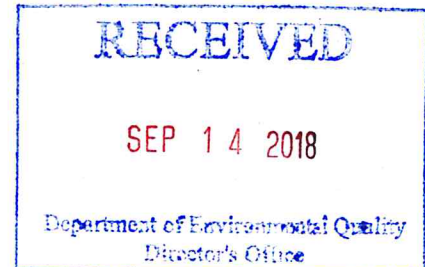
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

1595 Wynkoop Street  
Denver, CO 80202-1129  
Phone 800-227-8917  
www.epa.gov/region08

SEP 07 2018

Ref: 8WP-CWQ

Christine Deveny  
Chair, Montana Board of Environmental Review  
Montana Department of Environmental Quality  
Metcalf Building, 1520 East Sixth Avenue  
P.O. Box 200901  
Helena, Montana 59620-0901



Subject: The EPA's action on Montana's individual water quality standards variance authorizing provision (ARM 17.30.661)

Dear Ms. Deveny:

The U.S. Environmental Protection Agency (EPA) has completed its review of Montana's new water quality standards (WQS) individual variance authorizing provision (ARM 17.30.661) and is approving the WQS as described in the enclosure to this letter. Receipt of the submission on July 9, 2018, initiated the EPA's review of the new WQS pursuant to Section 303(c) of the Clean Water Act (CWA) and the implementing federal water quality standards regulation (40 C.F.R. Part 131). The submission included: (1) ARM 17.30.661; (2) rulemaking documents including public notices, public comments, and response to comments; (3) transcript of the public hearing on January 26, 2018; and (4) Special Assistant Attorney General's certification that the WQS were duly adopted pursuant to state law.

### Clean Water Act Review Requirements

The CWA § 303(c)(2), requires states and authorized Indian tribes<sup>1</sup> to submit new or revised WQS to the EPA for review. The EPA is required to review and approve, or disapprove, the submitted standards. Pursuant to CWA § 303(c)(3), if the EPA determines that any standard is not consistent with the applicable requirements of the Act, the Agency shall, not later than the ninetieth day after the date of submission, notify the state or authorized tribe and specify the changes to meet the requirements. If such changes are not adopted by the state or authorized tribe within ninety days after the date of notification, the EPA is to promptly propose and then promulgate such standard pursuant to CWA § 303(c)(4). The Region's goal has been, and will continue to be, to work closely with states and authorized tribes throughout the standards revision process so that submitted revisions can be approved by the EPA. Pursuant to 40 C.F.R. § 131.21(c), new or revised state standards submitted to the EPA after May 30, 2000, are not effective for CWA purposes until approved by the EPA.

<sup>1</sup> CWA § 518(e) specifically authorizes EPA to treat eligible Indian tribes in the same manner as states for purposes of CWA § 303. See also 40 C.F.R. § 131.8.

## **Today's Action**

Montana adopted ARM 17.30.661, which authorizes the Montana Department of Environmental Quality to adopt discharger-specific WQS variances (which Montana calls individual variances) from designated uses and criteria, under certain circumstances. The WQS variance authorizing provision constitutes a general policy as described at 40 C.F.R. § 131.13 and is subject to EPA review and approval. 40 C.F.R. § 131.14 describes the requirements for WQS variances. Consequently, the regulations at 40 C.F.R. § 131.14 inform the EPA's consideration of state and tribal WQS variance authorizing provisions. Today, the EPA is approving ARM 17.30.661. The basis for the EPA's approval is summarized in the enclosure. The EPA notes that its action on such an authorizing provision does not guarantee EPA approval of subsequent WQS variances adopted by the state pursuant to such provision. Any WQS variance adopted by Montana must be submitted and approved by EPA as consistent with 40 C.F.R. § 131.14.

## **Endangered Species Act Requirements**

The EPA has determined that its approval of Montana's WQS is a federal action which is not subject to the Section 7(a)(2) consultation requirements of the Endangered Species Act (ESA). The basis for the EPA's determination is provided in the enclosure.

## **Indian Country**

The EPA's approval of Montana's submitted WQS does not extend to Indian country as defined in 18 U.S.C. Section 1151. Indian country generally includes lands within the exterior boundaries of the following Indian reservations located within Montana: Crow Indian Reservation, Blackfeet Indian Reservation, Flathead Reservation, Fort Belknap Reservation, Fort Peck Indian Reservation, Rocky Boy's Reservation, and Northern Cheyenne Indian Reservation; any land held in trust by the United States for an Indian tribe; and any other areas that are "Indian country" within the meaning of 18 U.S.C. Section 1151. Today's action is not intended as an action to approve or disapprove WQS applying to waters within Indian country. The EPA, or eligible Indian tribes, as appropriate, will retain responsibilities under CWA Section 303 in Indian country.

## **Conclusion**

We thank the Department and the Board for your work to protect and improve the waters of Montana. If you have any questions, please call Tonya Fish on my staff at (303) 312-6832 or [fish.tonya@epa.gov](mailto:fish.tonya@epa.gov).

Sincerely,



Darcy O'Connor  
Assistant Regional Administrator  
Office of Water Protection

Enclosure



## **Rationale for the EPA's Action and Endangered Species Act Determination on Montana's New Variance Authorizing Provision (ARM 17.30.661)**

### **EPA's Action**

A water quality standards (WQS) variance is a time-limited designated use and criterion for a specific pollutant(s) or water quality parameter(s) that reflect the highest attainable condition (HAC) during the term of the WQS variance (40 C.F.R. § 131.3(o)). WQS variances are explicitly authorized under 40 C.F.R. § 131.14. A WQS is an option that can be used prior to pursuing a permanent revision of the designated use and criteria in situations where the applicable designated uses are not attainable in the near-term, but may be attainable in the future. WQS variances allow time to make incremental progress toward the ultimate water quality objective for the water body. Montana promulgated ARM 17.30.661, which authorizes the Montana Department of Environmental Quality (DEQ) to adopt individual variances from designated uses and criteria, under certain circumstances.

The EPA's WQS regulation at 40 C.F.R. § 131.14 authorizes states and authorized tribes to adopt WQS variances and submit them to the EPA for review and approval pursuant to Clean Water Act (CWA) Section 303(c) and 40 C.F.R. § 131.14. States and authorized tribes are not required to adopt their own authorizing provisions before making use of WQS variances. 80 Fed. Reg. 51020, 51040 (Aug. 21, 2015). However, Montana chose to adopt an individual variance authorizing provision that is considered a general policy subject to EPA review and approval (40 C.F.R. § 131.13). While variance authorizing provisions are not required, they must not undermine the ability of the state or authorized tribe to adopt WQS variances consistent with 40 C.F.R. § 131.14. Any WQS variance adopted pursuant to a state or tribal authorizing provision must still meet all the requirements of 40 C.F.R. § 131.14<sup>2</sup> and is not effective for CWA purposes until the EPA approves the WQS variance (40 C.F.R. § 131.21(c)(2), and 40 C.F.R. § 131.14(a)(3)). Therefore, the EPA's basis for review and action on Montana's new variance authorizing provision is not whether the authorizing provision includes all the requirements of 40 C.F.R. § 131.14 but whether the authorizing provision appropriately directs the adoption of variances that can be consistent with 40 C.F.R. § 131.14 and does not contradict the requirements of 40 C.F.R. § 131.14. A summary of that review is presented below.

#### **A. 40 C.F.R. § 131.14(a)(1-4)**

- 40 C.F.R. § 131.14(a)(1) provides that a water quality standards variance “only applies to the permittee(s) specified in the variance.”
- 40 C.F.R. § 131.14(a)(2) provides that “[w]here a State adopts a WQS variance, the State must retain, in its standards, the underlying designated use and criterion addressed by the WQS variance, unless the State adopts and the EPA approves a revision to the underlying designated use and criterion consistent with § 131.10 and 131.11. All other applicable standards not specifically addressed by the WQS variance remain applicable.”
- 40 C.F.R. § 131.14(a)(3) provides that the “variance, once adopted by the State and approved by EPA, shall be the applicable standard for purposes of the Act under § 131.21(d) through (e), for the following limited purposes. An approved WQS variance applies for the purposes of

---

<sup>2</sup> See response to Comment NO: 44 in the state's Notice of Adoption: “Any variance adopted by the state will be consistent with federal rules including 40 CFR 131.14.”



developing NPDES [National Pollutant Discharge Elimination System] permit limits and requirements under 301(b)(1)(C), where appropriate, consistent with paragraph (a)(1) of this section. States and other certifying entities may also use an approved WQS variance when issuing certifications under section 401 of the [Clean Water] Act.”

- 40 C.F.R. § 131.14(a)(4) provides that “A State may not adopt WQS variances if the designated use and criterion addressed by the WQS variance can be achieved by implementing technology-based effluent limits required under sections 301(b) and 306 of the [Clean Water] Act.”

#### EPA Basis for Approval

As detailed in the bullets below, Montana’s rules do not contradict 40 C.F.R. § 131.14(a)(1-4) and will enable individual variances to be developed consistent with 40 C.F.R. § 131.14.

- Consistent with 40 C.F.R. § 131.14(a)(1), ARM 17.30.661 Section 2(b) requires individual variances to specify the permittee(s) to which the variance applies.
- ARM 17.30.661 does not involve the removal of the underlying designated uses or the criteria adopted to protect those designated uses during the term of the variance. Montana included a response in its response to comments that recognized the variance would only be a basis for water quality-based effluent limits for the specific parameter subject to the variance but that the discharger would need to meet limits based on the designated use and criteria not subject to the variance.<sup>3</sup> The authorizing provision, therefore, does not undermine the ability of the state to meet this requirement in subsequent WQS variances. The EPA will review each of the subsequent actions to ensure that the underlying designated use and criteria are retained consistent with 40 C.F.R. § 131.14(a)(2).
- Consistent with 40 C.F.R. § 131.14(a)(3), ARM 17.30.661 only authorizes variances for purposes of Montana Pollutant Discharge Elimination System permit limits.
- Individual variances developed pursuant to ARM 17.30.661 will need to specify the designated use and criterion and that the designated use and criterion addressed by the WQS variance cannot be achieved by implementing technology-based effluent limits required under sections 301(b) and 306 of the Clean Water Act consistent with 40 C.F.R. § 131.14(a)(4).

#### **B. 40 C.F.R. § 131.14(b)(1)(i): The variance needs to specify the pollutant, permittee and the water bodies to which the variances apply.**

#### EPA Basis for Approval

Montana’s variance authorizing provision at ARM 17.30.661 Sections 2(a - c) is consistent with 40 C.F.R. § 131.14(b)(1)(i) and will enable individual variances to be developed consistent with 40 C.F.R. § 131.14.

---

<sup>3</sup> See response to Comment NO. 37 in the state’s Notice of Adoption: “The variance would only provide relief from the water quality-based effluent limit associated with the parameter to which the variance applies and the discharger would have to comply with all other conditions and limitations in their permit including technology-based effluent limits and water quality based effluent limits based on water quality standards that are not subject to the variance.”

**C. 40 C.F.R. § 131.14(b)(1)(ii): Requirements that apply throughout the term of the variance that reflect the highest attainable condition (HAC).**

40 C.F.R. § 131.14(b)(1)(ii) states:

The requirements [that apply throughout the term of the variance] shall represent the highest attainable condition of the water body or waterbody segment applicable throughout the term of the WQS variance based on the documentation required in (b)(2) of this section. The requirements shall not result in any lowering of the currently attained ambient water quality, unless a WQS variance is necessary for restoration activities, consistent with paragraph (b)(2)(i)(A)(2) of this section. The State must specify the highest attainable condition of the water body or waterbody segment as a quantifiable expression that is one of the following:

(A) For discharger(s)-specific WQS variances:

- (1) The highest attainable interim criterion; or
- (2) The interim effluent condition that reflects the greatest pollutant reduction achievable; or
- (3) If no additional feasible pollutant control technology can be identified, the interim criterion or interim effluent condition that reflects the greatest pollutant reduction achievable with the pollutant control technologies installed at the time the State adopts the WQS variance, and the adoption and implementation of a Pollutant Minimization Program (PMP).

EPA Basis for Approval

As detailed in the bullets below, Montana's variance authorizing provision is consistent with 40 C.F.R. § 131.14(b)(1)(ii).

- ARM 17.30.661 Section 2(e) includes options for quantifying the HAC that are consistent with 40 C.F.R. § 131.14(b)(1)(ii)(A).
- ARM 17.30.661 Section 2(e) requires that permittees submit an application that includes a proposed HAC and supporting documentation. Under ARM 17.30.661 Section 5, the state then determines whether the information provided by the applicant is sufficient and if so, proceeds with rulemaking and adoption and submission to the EPA. The EPA notes that where a WQS variance is based on 40 C.F.R. § 131.14(b)(1)(ii)(A)(3), the PMP must be adopted as part of the individual variance.
- A WQS variance may not result in any lowering of currently attained ambient water quality, unless the WQS variance will be used for restoration activities (40 CFR § 131.14(b)(1)(ii)). ARM 17.30.661 does not authorize WQS variances for restoration activities. ARM 17.30.661 Section 8 requires reevaluation of the HAC every five years and interprets "currently attained ambient water quality" to mean the previous two years of data in situations where the water quality in the receiving stream has improved during the term of the variance. This is appropriate for the limited scenarios addressed by Montana's rules (historic mining is an example provided in the Reason section of MAR Notice No. 17-395) where using five years



of data would result in a less stringent HAC and would not preserve the water quality improvements toward the ultimate water quality objective for the water body.<sup>4</sup>

Montana's WQS variance authorizing provision only authorizes discharger-specific variances and does not enable waterbody variances; therefore, 40 C.F.R. § 131.14(b)(2)(B), which establishes requirements for waterbody variances, is irrelevant to the EPA's basis for approval.

**D. 40 C.F.R. § 131.14(b)(1)(iii-vi)**

- 40 C.F.R. § 131.14(b)(1)(iii) requires that variances must include: "A statement providing that the requirements of the WQS variance are either the highest attainable condition [HAC] identified at the time of the adoption of the WQS variance, or the highest attainable condition later identified during any reevaluation consistent with paragraph (b)(1)(v) of this section, whichever is more stringent."
- 40 C.F.R. § 131.14(b)(1)(iv) provides that the term of the variance must only be as long as necessary to achieve the HAC and that the state may adopt subsequent variances.
- 40 C.F.R. § 131.14(b)(1)(v) requires that variances "with a term greater than five years, [must include] a specified frequency to reevaluate the highest attainable condition using all existing and readily available information and a provision specifying how the State intends to obtain public input on the reevaluation. Such reevaluations must occur no less frequently than every five years after EPA approval of the WQS variance and the results of such reevaluation must be submitted to EPA within 30 days of completion of the reevaluation."
- 40 C.F.R. § 131.14(b)(1)(vi) requires that a variance must include a provision that the WQS variance will no longer be the applicable WQS for purposes of the CWA if the State does not conduct a reevaluation consistent with the frequency specified in the variance or the results are not submitted to EPA as required by 40 C.F.R. § 131.14(b)(1)(v).

EPA Basis for Approval

As detailed in the bullets below, Montana's variance authorizing provision does not contradict 40 C.F.R. § 131.14(b)(1)(iii)-(vi) and will enable individual variances to be developed consistent with 40 C.F.R. § 131.14.

- To meet the requirements of 40 C.F.R. § 131.14(b)(1)(iii), individual variances developed pursuant to ARM 17.30.661 will need to include a statement that "the requirements of the WQS variance are either the highest attainable condition identified at the time of the adoption of the WQS variance, or the highest attainable condition later identified during any reevaluation."
- Montana's authorizing provision does not include a specific requirement for the permittee to identify the requested term of the variance. However, the state acknowledges that any subsequent variance must meet 40 C.F.R. § 131.14.<sup>5</sup> Therefore, EPA will review any subsequent variance to

<sup>4</sup> See response to Comment NO. 25 in the state's Notice of Adoption: "The board finds New Rule I(8) reasonably interprets 'currently attained ambient water quality' to be reflected by the previous two years of data in situations where the water quality in the receiving stream has improved during the variance term. If upstream improvements are occurring, presumably from remediation, the variance must be modified to reflect these improvements."

<sup>5</sup> See response to Comment NO. 44 in the state's Notice of Adoption: "Any variance adopted by the state will be consistent with federal rules including 40 CFR 131.14."



ensure that a term is included consistent with 40 C.F.R. § 131.14(b)(1)(iv). The EPA interprets ARM 17.30.661 Section 1(c) to mean that the state is not authorizing variances to be used when the condition can be addressed in less than 5 years (the normal permit term), which is within the state's discretion. The state's response to Comment NO. 11 in the Notice of Adoption confirms this interpretation: "The department will have to conclude for each application for variance whether the condition is likely to be remediated in the next five years. If the condition will be, or is expected to be, remediated in the next five years, the department would not grant the variance." The EPA expects the state to justify the term associated with any variance submission, as required by 40 C.F.R. § 131.14(b)(2)(ii).

- Consistent with 40 C.F.R. § 131.14(b)(1)(v), ARM 17.30.661 Section 8 states "The variance must be reviewed by the department every five years to reevaluate the conditions in 2(e) [the HAC]. Based on this review, the department may terminate, continue, or modify the variance. In order to continue or modify the variance, the permittee shall provide information demonstrating compliance with (1)<sup>6</sup> and (2)<sup>7</sup>." EPA notes that the requirement at 40 C.F.R. § 131.14(b)(1)(v) specifies that the reevaluation must occur no less than five years after EPA approval. Therefore, EPA interprets the statement at Section 8 to mean that the reevaluation will occur 5 years from EPA approval.<sup>8</sup> Further, Section 9 authorizes the department to approve the variance, with any modifications after public comment and public hearing which indicates that the state intends to obtain public input on any reevaluation through a public comment and public hearing process.
- Individual variances developed pursuant to ARM 17.30.661 will need to include a provision that "the WQS variance will no longer be the applicable WQS for purposes of the Act if the State does not conduct a reevaluation consistent with the frequency specified in the WQS variance or the results are not submitted to EPA as required by (b)(1)(v) of this section" consistent with 40 C.F.R. § 131.14(b)(1)(vi).

**E. 40 C.F.R. § 131.14(b)(2)(i): The supporting documentation must document the need for a WQS variance.**

- 40 C.F.R. § 131.14(b)(2)(i)(A) requires documentation demonstrating that attaining CWA Section 101(a)(2) uses and criteria is not feasible throughout the term of the variance because one of the factors listed in 40 C.F.R. § 131.10(g) is met or, or actions necessary to facilitate lake, wetland or stream restoration through dam removal or other significant reconfiguration activities preclude attainment of the designated use and criterion while the actions are being implemented.
- 40 C.F.R. § 131.14(b)(2)(i)(B) describes documentation requirements for non-CWA Section 101(a)(2) uses, which include the requirements satisfying (b)(2)(i)(A) of this section.

EPA Basis for Approval

As detailed in the bullets below, the Montana's WQS variance authorizing provision does not

<sup>6</sup> One of the demonstrations provided at 40 C.F.R. § 131.14 (b)(2)(i)(A)(1).

<sup>7</sup> Identifies the permittee, pollutant, water body, and HAC.

<sup>8</sup> The EPA notes that ARM 17.30.661 Section 7 requires DEQ to "review the variance five years from the date the department issues a final discharge permit incorporating the variance." The EPA reiterates that 40 C.F.R. § 131.14(b)(1)(v) specifies that the reevaluation must occur no less than five years after EPA approval of the variance. Therefore, a reevaluation must occur every five years from the date of EPA approval of any subsequent variance adopted pursuant to this authorizing provision.



contradict 40 C.F.R. § 131.14(b)(2)(i)(A-B) and will enable individual variances to be developed consistent with 40 C.F.R. § 131.14.

- ARM 17.30.661 Section 1(e) requires the department to determine in writing that “one of the demonstrations provided at 40 C.F.R. § 131.14(b)(2)(i)(A)(1)” applies and is consistent with 40 C.F.R. § 131.14(b)(2)(i)(A). Montana’s rules do not distinguish between CWA Section 101(a)(2) uses and non-CWA Section 101(a)(2) uses, consequently, the same demonstrations and documentation that are necessary for variances to CWA Section 101(a)(2) uses are necessary for non-CWA Section 101(a)(2) uses. This approach is consistent with 40 C.F.R. § 131.14(b)(2)(i)(B).
- ARM 17.30.661 Sections 1(a) – 1(d) are additional state requirements.<sup>9</sup> With respect to 1(d), none of the factors in 40 C.F.R. § 131.14(b)(2)(i)(A) address consideration of *de minimis* contributions. The state has the authority and discretion to only allow variances to dischargers that “would not materially contribute” to the receiving waterbody conditions for the pollutant in question, however one of the seven factors in 40 CFR § 131.14(b)(2)(i)(A) must also be satisfied. The EPA notes that Montana has not authorized restoration variances that are allowed under the federal rule at 40 C.F.R. § 131.14 (b)(2)(i)(A)(2), therefore, one of the remaining six factors must be satisfied. As long as (d) is considered after ensuring that one of the federal factors is met to justify the variance, (d) is consistent with the federal regulations.

**F. 40 C.F.R. § 131.14(b)(2)(ii): The supporting documentation must demonstrate that “the term of the WQS variance is only as long as necessary to achieve the highest attainable condition.”**

40 C.F.R. § 131.14(b)(2)(ii) goes on to indicate that such documentation must justify the term of the WQS variance by describing the pollutant control activities to achieve the HAC, including those identified through a pollutant management plan.

EPA Basis for Approval

Montana’s variance authorizing provision does not contradict 40 C.F.R. § 131.14(b)(2)(ii) and will enable individual variances to be developed consistent with 40 C.F.R. § 131.14. For individual variances developed pursuant to ARM 17.30.661, Montana will need to provide the pollutant control activities that will be implemented to achieve the HAC as its supporting documentation to justify the term of the variance is only as long as necessary to achieve the HAC consistent with 40 CFR § 131.14 (b)(2)(ii). As discussed above, ARM 17.30.661 does not authorize variances where the condition can be remedied during the term of a permit, or in less than 5 years.

**G. 40 C.F.R. § 131.14(b)(2)(iii) describes requirements for supporting documentation to justify a variance for a water body or waterbody segment.**

EPA Basis for Approval

Montana’s rules do not authorize waterbody variances, therefore the requirements at 40 C.F.R. § 131.14(b)(2)(iii) are not relevant to the EPA’s action.

---

<sup>9</sup> See response to Comment NO. 18 in the state’s Notice of Adoption: “The board views the condition in 75-5-222(2)(a)(ii), MCA that the discharge not materially contribute to the condition of the water body as an additional state requirement beyond the minimum federal requirements for granting a variance.”



**H. 40 C.F.R. § 131.14(c): A WQS variance is the applicable water quality standard for NPDES permitting for the term of the WQS variance.**

40 C.F.R. § 131.14(c) also requires that “any limitations and requirements necessary to implement the WQS variance shall be included as enforceable conditions of the NPDES permit for the permittee(s) subject to the WQS variance.”

EPA Basis for Approval

Montana’s variance authorizing provision does not contradict 40 C.F.R. § 131.14(b)(2)(ii) and will enable individual variances to be developed consistent with 40 C.F.R. § 131.14. Permits associated with individual variances developed pursuant to ARM 17.30.661 will need to include enforceable conditions to implement the WQS variance consistent with 40 C.F.R. § 131.14(c).

**Endangered Species Act Determination**

Section 7(a)(2) of the Endangered Species Act (ESA) states “each federal agency ... shall ...insure that any action authorized, funded or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined to be critical...” The EPA’s action on variance authorizing provisions require a future rule change for there to be a revision to the WQS that apply to a specific waterbody. In other words, the adopted rules establish the general rules regarding WQS variances and do not authorize or create any specific variances. It is not possible to determine potential effects of the future implementation of these provisions to listed species at this time since it is not clear where the new or revised WQS will be applied; the potential occurrence of listed species or their designated critical habitats is unknown; and, in some situations, how the WQS will change is still to be determined (e.g., the magnitude, frequency and duration of site-specific standards, interim limits associated with WQS variances). For these reasons, the EPA has determined that its action on these provisions will have no effect on listed species or their designated critical habitat. When the state implements these provisions by adopting new or revised WQS for specific waterbodies, the EPA will determine at that time if ESA consultation is required for the future EPA action.